

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Rules
Governing Driver Information, Licensing,
and Testing; Minnesota Rules Chapter 7410

**ORDER OF THE CHIEF
ADMINISTRATIVE LAW JUDGE**

WHEREAS, a hearing was held on January 10, 2012, before Barbara L. Neilson, an Administrative Law Judge with the Office of Administrative Hearings, on the above-entitled matter in compliance with the rulemaking provisions of Minn. Stat. Chapter 14;

WHEREAS, pursuant to Minn. Stat. § 14.15, the Administrative Law Judge and the Chief Administrative Law Judge issued Reports on March 7, 2012, and March 9, 2012, respectively, in which one portion of the proposed rules was disapproved;

WHEREAS, pursuant to Minn. Stat. § 14.16 and Minn. R. 1400.2240, subp. 4, the Department of Public Safety modified the rules and resubmitted them to the Chief Administrative Law Judge for review on April 13, 2012;

WHEREAS, the Chief Administrative Law Judge finds that the final proposed rules are not substantially different from those proposed at the public hearing and that the Department of Public Safety has cured the defects in the rules as required;

WHEREAS, the Chief Administrative Law Judge further finds, for the reasons discussed in the attached Memorandum, that the Department's failure to publish a notice soliciting comments from the public on the subject matter of a possible rulemaking proposal under active consideration within 60 days of the effective date of a new or amendatory law requiring rules to be adopted, amended or repealed constituted a harmless error within the meaning of Minn. Stat. § 14.26, subd. 3(d); and

WHEREAS, the Office of Administrative Hearings has the responsibility of filing the rules with the Secretary of State pursuant to Minn. Stat. § 14.08(b) and Minn. R. 2240, subp. 10;

NOW, THEREFORE, upon receipt of this Order, the Department of Public Safety may adopt the rules pursuant to Minn. Stat. § 14.16, subdivision 1; and, upon receipt of notification that the rules have been filed with the Secretary of State, the Department of Public Safety has the responsibility of publishing the adopted rules in the State Register in accordance with Minn. Stat. § 14.18.

Dated: April 18, 2012.

s/Raymond R. Krause
RAYMOND R. KRAUSE
Chief Administrative Law Judge

MEMORANDUM

Under Minn. Stat. § 14.101, agencies must solicit comments from the public on the subject matter of a proposed rulemaking proposal under active consideration within the agency by causing a notice to be published in the State Register "within 60 days of the effective date of any new or mandatory law requiring rules to be adopted, amended, or repealed." In this proceeding, the Department's statutory authority to adopt the proposed rules became effective on May 14, 2010.¹ Accordingly, the Department should have published its Request for Comments with respect to the possible rules on or before July 14, 2010, as required by Minn. Stat. § 14.101. However, the Department did not publish the Request for Comments until June 27, 2011, almost a year later. The Request for Comments noted that the Department had not yet drafted the possible rules and provided the name of an individual who could be contacted to receive a draft of the rules when one had been prepared.²

The failure of the Department to publish the Request for Comments by July 14, 2010, constitutes a procedural defect in this proceeding. A procedural defect can be considered a harmless error under Minn. Stat. § 14.26, subd. 3(d), if "(1) the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process; or (2) the agency has taken corrective action to cure the error or defect so that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process." The language of Minn. Stat. § 14.101 is directory in nature, not mandatory, and the statute does not specify any penalty for a failure to comply with its provisions.³ Presumably, the purpose of the requirement that an agency publish a Request for Comments within 60 days of the effective date of its authorizing legislation is to ensure that an agency begins the process of public notification so that it will stay on schedule to publish its Notice of Intent to Adopt Rules within 18 months, as required by Minn. Stat. § 14.125. In this instance, the Request for Comments was published more than 60 days before the Notice of Hearing was published and the comment period remained open until the Notice of Hearing was published on November 7, 2011 (just one week shy of 18 months after the legislation authorizing rulemaking became effective). The Department received comments from members of the public in response to the Request for Comments and provided additional notice of the rule hearing to an extensive number of persons. Although few individuals chose to participate in the rule hearing or provide written comments after the hearing, they had ample notice and opportunity to do so.

Because the language of Minn. Stat. § 14.101 is directory and not mandatory, and because the procedural error in the timing of the publication of the Request for

¹ See Minn. Laws 2010, Chapter 316, Sec. 18 (rulemaking authorization contained in Sec. 17 was effective the day following final enactment). The law was signed by the Governor on May 13, 2010.

² 35 State Reg. 2042-2043 (June 27, 2011).

³ This differs from Minn. Stat. § 14.125, which explicitly states that an agency's rulemaking authority will expire if it fails to publish its Notice of Hearing within 18 months of the effective date of the law authorizing or requiring rules to be adopted.

Comments did not deprive anyone of the opportunity to meaningfully participate in the rulemaking process, this procedural defect is found to be a harmless error.

R. R. K.